

## BASIS STATEMENT

This rule is an amendment of Chapter 305 Permit by Rule Standards. This amendment affects only Section 10 Stream Crossings and modifies certain applicability, submission and construction standards in response to the lapse of an emergency rule affecting this section which expired on Oct. 16, 1999.

The Board of Environmental Protection received comments at a public hearing held on November 18, 1999, in Augusta, Maine. Written comments were accepted into the record until 5:00 P.M. on November 30, 1999.

## LIST OF COMMENTERS

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|-----|--------------------|--|
| 1.  | Abby Holman        | Maine Forest Products Council                      |
| 2.  | Tom Ruksznis       | International Paper Company                        |
| 3.  | Sheryl Russell     | Professional Logging Contractors of Maine          |
| 4.  | Douglas P. Denico  | Plum Creek Maine Marketing, Inc.                   |
| 5.  | Morton Moesswilde  | Maine Forest Service                               |
| 6.  | Gordon Stewart     | Small Woodland Owners Association of Maine         |
| 7.  | Isabel McKay       | Izzy McKay Forestcare                              |
| 8.  | Brian Swan         | Department of Marine Resources (DMR)               |
| 9.  | Norm Dube          | Atlantic Salmon Commission (ASC)                   |
| 10. | Steve Timpano      | Department of Inland Fisheries and Wildlife (IF&W) |
| 11. | Daniel J. Corcoran | Great Northern Paper Co.                           |
| 12. | Joel Swanton       | Champion International                             |

## RESPONSE TO COMMENTS

The following paragraphs contain summaries of comments in the record along with responses from the Department of Environmental Protection.

1. Comment: General support for the amendment allowing projects consisting of multiple crossing to proceed under Permit by Rule (PBR) was expressed. (1, 2, 3, 4, 5, 6, 7, 11, 12)
2. Comment: Several commenters supported the change making the Department responsible for reviewing and approving the timing of a construction of a crossing. Previously, the rule required the applicant to receive timing approval directly from other state resource agencies (DMR, ASC, and IF&W) prior to filing the PBR Notification Form. (1, 2, 5, 6)
3. Comment: A number of commenters expressed concern about the elimination of the waiver of the 14 day waiting period for crossings associated with forest management activities, expressing a need in forestry operations to quickly move locations in response to weather and market conditions. (1, 2, 3, 4, 11, 12)

Response: The proposed change requiring the department to approve an applicant's timing of construction cannot work without some time being allowed for staff to contact the appropriate state resource agencies about the location and timing of the proposed crossing. Fourteen days is the normal review time period for all PBR activities proposed by all other applicants. At the public hearing, no lesser time period (e.g. 10 days) was identified or suggested. No change was made.

4. Comment: Concern was expressed about the basis for the construction window of July 15 to October 1 of each year. Additionally, there are no clear standards included in the rule that explain what the basis might be for the department's denial of a crossing proposed outside of this construction window. (1, 2, 3, 4, 11, 12)

Response: The construction window already exists in federal regulatory programs and was added to PBR in June 1999 in response to other state resource agencies' concerns. The basis for concern is both water quality and fisheries impacts. The current PBR standards are considered adequate in most cases for water quality protection. However, IF&W, DMR and ASC all point out that installing erosion controls in frozen ground is difficult at best and that late season projects cannot get vegetation reestablished until the following year. As such, a greater potential for soil erosion exists for a longer period of time. This can lead to greater physical impact in the streams (sedimentation of habitat) and both direct and indirect impacts on the fisheries in the stream. For example, large scale siltation can directly harm fishes gills. Also, long term siltation may force fish to evacuate the stream, diminishing spawning and feeding opportunities. Siltation also impacts the stream insect life (i.e. macro invertebrates), necessary as food sources.

Unfortunately, the state resource agencies cannot at this time pinpoint those specific areas in streams where a fisheries concern exists. Only broad areas of specific interest have been provided to the department. Further, these agencies' concerns at any given location can vary depending upon the size of the project and the length of time needed for in-stream work.

It is the department's position that this construction window and review of construction timing should be given an opportunity to work. While appreciating the desire of the regulated community to keep PBR a predictable process, new and increased concern about, and responsibility for, a number of fisheries by the various state resource agencies causes a need for this 2 week review process. The department will continue to explore the development and use of improved standards for work outside the construction window where such standards can lead to the elimination of this review process and, hence, the unpredictability that is of concern to applicants. Further, as specific areas of fisheries concern are mapped, this information can become available to applicants ahead of time to be factored into their construction planning.

Comments on this issue indicate that the construction window is less of a problem, if any, for smaller woodlot owners who may harvest outside the construction window but do not typically build new roads to do so. Rather, skid trails are utilized and simple spans can be used on streams such that the construction window does not apply or the Natural

Resources Protection Act is not triggered (i.e. use of temporary structures). Larger landowners have clearly shown a need to construct roads given the scale of their operations. Any landowner can approach the state resource agencies ahead of time to identify those areas, if any, where the agencies may have a concern with crossings built outside the construction window. By doing this, larger landowners can plan around sensitive areas and reduce the uncertainty of the department's construction timing review. In fact, if crossing locations and timing have been pre-approved by the state resource agencies, this information may be submitted with the PBR Notification Form and no waiting period will be required.

To clarify that water quality and fisheries impacts are the main concern of this review, language has been added in Section 10(C)(13) as follows: "...An alternative time period will be required where it appears an unreasonable impact on water quality or fisheries may result at the point of crossing or immediately downstream of the crossing."

5. Comment: The department should clarify that Section 10 Stream Crossings applies only to permanent crossings. (6)

Response: It is the department's position that all culvert crossings and all bridge crossings that disturb the stream bank or bottom require permitting regardless of the length of time they remain in the resource. Further, while temporary spans of streams that do not disturb the banks or bottom may not trigger the NRPA, any road building associated with them does. Except for some recreational and skidder trails, relatively few stream crossings consisting of a bridge or span do not trigger the need for a permit. A note has been added below Section 10(A)(1)(c) however to clarify this.

6. Comment: One commenter felt that some of the standards in Section 10 only apply dependent upon whether the activity is related to agriculture, forestry, etc. It was suggested that for forestry related crossings, the rule simply require compliance with the Best Management Practices (BMPs) developed and promoted by the Maine Forest Service. (6)

Response: The BMPs referred to above also cover a number of activities that may not be subject to jurisdiction under the NRPA. Within the forest products industry, concern has been expressed about requiring the use of all the BMPs for all facets of their harvesting activities. While good guidelines, making the BMPs the regulatory standard has not been fully embraced. Additionally, there are certain legal ramifications to simply incorporating standards like the BMPs into a rule.

The department fully supports the use of the BMPs understanding they essentially mirror the standards found in PBR both in spirit and in many cases to the letter. An applicant using the BMPs will not be found out of compliance with the PBR standards.

7. Comment: It was not clear to one commenter whether it is a requirement of PBR to contact and receive approval from the U.S. Army Corps of Engineers for a crossing built outside the construction window. (4)

Response: It is not required as part of the PBR process to receive any approvals from other state, local or federal agencies. The Note included in the rule is simply there to advise applicants of the Army Corps' jurisdiction.